EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

May 15, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

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SUBJECT: Draft DOJ report on S. 774, "The Freedom of Information Reform Act", as passed by the Senate 2/27/84.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

10:00 A.M. FRIDAY, MAY 18, 1984. (NOTE: A hearing is scheduled for 4/24/84.)

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: C. Wirtz R. Veeder K. Wilson

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S. 774, a bill to improve the operation of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. After extensive consideration by the Senate Committee on the Judiciary during the 97th and 98th Congresses, that Committee twice voted unanimously to approve the substance of S. 774 and, with minor technical changes, the Senate approved the measure without dissent on February 27, 1984. The Department of Justice strongly endorses the compromise provisions of S. 774, and recommends in favor of enactment. In view of the many specific changes to the FOIA made by the bill, we discuss the bill's provisions at some length.

I. ANALYSIS OF THE PROVISIONS OF THE BILL

Fees and Waivers

Under existing law, agencies can collect only the costs of searching for and copying requested documents, which are only a fraction of the true costs of responding to a FOIA request -- less than 4 percent. The expense of reviewing documents, redacting exempt material, and performing other processing accounts for the remaining 96% of the total cost.

Section 1 would authorize agencies to recover from requesters fees which more nearly reflect the true costs of processing their FOIA requests. Besides encouraging agencies to recover a greater proportion of their costs, Section 2 would encourage all requesters to make reasonable efforts to narrow unduly broad requests.

The cost to the government of processing a request does not necessarily bear any correlation to the public interest in

disclosure. The majority of all FOIA requests are filed by or on behalf of corporations for private, commercial reasons. In many instances, individuals have also made excessive use of the Act, at public expense, for reasons that are purely personal, that serve no public interest, and that may in some cases even be contrary to the public interest. In one case, a single Freedom of Information Act request for voluminous CIA documents by a renegade ex-agent, Philip Agee, cost the public nearly $500,000 to process. See Agee v. CIA, 517 F. Supp. 1335, 1342 n.5 (D.D.C. 1981).

Section 1 would allow agencies to collect "all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request." The bill includes several provisions constraining an agency's authority to collect fees. First, no charge may be made in connection with any request that requires no more than two hours of agency processing time and for which no more than twenty pages are released. Second, any processing charges must be reasonable, standard charges and must be limited to services directly attributable to responding to the request. Third, the term "processing" is defined to exclude services of agency personnel in resolving issues of law or policy of general applicability in responding to a request. Thus, a requester would not be charged for an agency's costs in establishing or rethinking a policy of general applicability, even if the request triggers such agency action. However, a requester could be charged the costs of review and redaction of documents pursuant to established agency policy.

Fee waivers. The bill retains essentially the same standard as in current law for waivers of search and copying fees. An automatic waiver of the new processing fees would be made for noncommercial requests by (1) individuals or institutions conducting scholarly or scientific research, (2) journalists, and (3) non-profit groups intending to make information publicly available. The bill would not affect the ability of individuals to obtain records about themselves under the Privacy Act of 1974 for only the cost of copying the record. See 5 U.S.C. § 552a(f)(5).

Commercially valuable information. Section 1 also permits an agency to charge additional fees for information that has a commercial market value and has been compiled by the government at substantial expense to the taxpayer. This provision carries out the existing federal policy enunciated in 31 U.S.C. § 3302 (1982), and would avoid the anomaly in current law that permits a requester to reap personal profit from valuable technological information that all taxpayers paid to develop, and which he obtained at fees reflecting little more than the cost of duplication. The term "royalty" was deleted from this provision by the Senate.

Partial retention of fees. Finally, section 1 permits each agency to retain one-half of the fees collected under the FOIA to defray in part the agency's expenses in complying with the Act. This provision would not apply if the agency was found by the General Accounting Office not to be in "substantial compliance" with the time limits of the FOIA.

Time Limits

Section 2 of the bill, while retaining the existing 10-day requirement for an initial response to a request, also provides more realistic time limits for processing burdensome FOIA requests and provides for expedited processing of requests that are made in the public interest.

The complexity and sheer volume of the requests received by many agencies often prevent compliance with the current time limits. Recognizing the inherent inability of many agencies to process requests within the specified time limits, many courts have freed agencies of the need to comply with time limits by resorting to use of the "exceptional circumstances" and "due diligence" provisions in section 552(a)(6)(C). In the leading case, Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976), the court ruled that an agency exercising due diligence in processing a great volume of FOIA requests is not strictly bound by the ten-day provision; the agency may process them on a "first-in, first-out" basis, unless the requester can demonstrate to a court "exceptional need or urgency" for preferential treatment.

The present, very short time limits in the FOIA may cause agencies to process requests hurriedly, thereby increasing the likelihood of premature denials, unnecessary litigation, and serious errors. The inevitable delays at many agencies have led many requesters to a general dissatisfaction with the Act's operation, as well as to some needless litigation. Finally, the present "first-in, first-out" system prevents agencies that have a backlog of requests from responding promptly to many requests from the public and the news media, unless the requester can demonstrate "exceptional need or urgency."

Accordingly, Section 2 of the bill would allow an agency, in the case of "unusual circumstances," to extend its deadline from ten to thirty days. It would also specifically recognize an extension of the time limits on account of a substantial backlog of requests. Section 2 also would require each agency to promulgate regulations to provide that requesters who demonstrate a compelling need for expedited processing and whose request will primarily benefit the general public should be given processing priority over other requesters.

Business Confidentiality Procedures

Section 3 of the bill establishes a procedural route for the protection of confidential business information, requiring

agencies to provide notice, an opportunity to object, and an opportunity to bring suit to oppose disclosure. However, the bill would not alter the substantive standard of Exemption 4.

Under these procedures, the submitter must designate, at the time of submission or thereafter, the information that is exempt under Exemption 4. The agency, upon receiving a request for the disclosure of such information, shall notify the submitter of the request, describe the nature and scope of the request, and inform the submitter of his right to object to disclosure. Notice to submitters is not required in five specified circumstances. Whenever the agency determines to disclose such information, notwithstanding the objections of a submitter, the agency must give the submitter at least ten working days notice of intent to disclose and of the submitter's right to file suit seeking to enjoin the disclosure. Nothing in these procedures alters other rights established by law protecting the confidentiality of private information -- such as the Trade Secrets Act, 18 U.S.C. § 1905, the Census Act, 13 U.S.C. § 301, or the Internal Revenue Code, 26 U.S.C. § 6103.

These provisions would permit a submitter, who is frequently more aware of the commercial value of information than is the government, to inform the government why the submitter believes the information should not be released. For these reasons, these proposed provisions should be beneficial not only to the submitter, but also to the government.

Judicial Review

Section 4 of the bill would amend section 552(a)(4)(B) of the Act to include a limitations period of 180 days for judicial review of an agency's denial of a request for disclosure. This is for administrative efficiency, to allow the closing of old request files, but would not prejudice requesters. The 180 day period is the same as that set forth in a number of other administrative enforcement provisions. See, e.g., 42 U.S.C. §§ 2000e-5(e) and 2000e-16(c) (Title VII employment discrimination); 42 U.S.C. § 3612(a) (housing discrimination); and 29 U.S.C. § 633a(d) (age discrimination).

Section 4 also would amend the FOIA to provide district court jurisdiction over suits to enjoin disclosure of trade secrets or other commercially valuable information provided to the government by a submitter. Currently, submitters have no direct right of action but must resort to an action under the Administrative Procedure Act, 5 U.S.C. § 706, to enjoin violations of the Trade Secrets Act, 18 U.S.C. § 1905. See Chrysler Corp. v. Brown, 441 U.S. 281, 285, 317-18 (1979). The bill would also provide for notice to both submitters and requesters that a suit to enjoin the withholding or disclosure of records has been filed, and for the district courts to have personal jurisdiction, in any suit filed under the Act, over

all requesters and submitters of particular information. These proposed provisions would ensure that an adverse party, whether submitter or requester, would receive notice of the complaint, have the right to intervene, and be bound by the court's decision.

Section 4 would also amend the provision of the Act authorizing the award of attorney fees in favor of a requester who "substantially prevails" in the litigation to authorize the award of attorney fees against submitters, as well as against the government. Thus, in disputes between a submitter and a requester, where the government's position is essentially that of a stakeholder of the disputed information, this provision would allow the court to charge the costs and attorney fees of a requester who substantially prevails against a submitter rather than against the United States. As under present law, the provision would authorize the award of attorney fees only in favor of requesters who substantially prevail, and even then the award would be discretionary.

Public Record Requests

Section 5 of S. 774 would amend the FOIA to eliminate the need for federal agencies to retrieve, duplicate, and mail records that are already publicly available. Requests that agencies disclose such documents often require employees to duplicate hundreds of pages of newspaper and magazine articles that a requester, with no greater effort, could locate and copy at the nearest public library. As Professor (now Circuit Judge) Antonin Scalia observed, there is no reason why federal agencies should be compelled to act as "the world's largest library reference system." 1/ In the case of public record items such as newspaper clippings and court records, Section 5 would implement that recommendation by allowing agencies the choice of providing an index identifying the date and source of public records (but only if the index already is in existence) or producing copies of the documents.

Clarify Exemptions

Section 6 of the bill merely clarifies the fact that the compulsory disclosure requirements of the Act do not apply to the exemptions listed in the paragraphs of section 552(b).

1/ Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcommittee on the Constitution of the Senate Committee on Judiciary, 97th Cong., 1st Sess. 953 (1981) (statement of Antonin Scalia, Professor of Law, Univ. of Chicago Law School).

Manuals and Examination Materials

Section 7 of S. 774 would make clear that materials whose confidentiality is necessary to effective law enforcement and other vital government functions are exempt from disclosure. Such materials include manuals and instructions to investigators, inspectors, auditors, and negotiators. Although materials of this nature are arguably protected under present law, the courts are divided over the application of Exemption 2 to law enforcement manuals 2/ and to audit guidelines. 3/

This confusion reflects the conflicting legislative history of Exemption 2. According to the Senate committee report, it was intended to relate only to internal personnel rules and practices of an agency, such as the agency's rules about its employees' use of parking facilities or its policies concerning sick leave. 4/ The House committee report, on the

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2/ One court granted a pro se Freedom of Information Act litigant access to all portions of the Drug Enforcement Administration Agents Manual other than those pertaining solely to internal housekeeping matters, Cox v. Department of Justice, 576 F.2d 1302 (8th Cir. 1978), only later to deny to that same pro se litigant the portions of the Federal Bureau of Investigation's Manual of Instruction relating to investigative techniques and procedures. Cox v. Levi, 592 F.2d 460 (8th Cir. 1979). See also Cox v. Department of Justice, 601 F.2d 1 (D.C. Cir. 1979) (same pro se litigant denied access to portions of United States Marshals Service Manual describing procedures for transporting prisoners in custody); Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979) (portions of Drug Enforcement Administration Agents Manual concerning DEA's handling of confidential informants and search warrant procedures ordered disclosed); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544 (2d Cir. 1978) (entire BATF pamphlet concerning raids and searches withheld from disclosure).

3/ Compare Hawkes v. IRS, 507 F.2d 481 (6th Cir. 1974) (Internal Revenue Service audit guidelines ordered disclosed), with Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717 (D.C. Cir.), vacated, reheard en banc, aff'd by an equally divided court, 591 F.2d 752 (D.C. Cir. 1978) (per curiam), cert. denied, 441 U.S. 906 (1979) (Federal Energy Administration guidelines for audits of refiners' reports withheld from disclosure).

4/ Senate Committee on the Judiciary, Clarifying & Protecting the Right of the Public to Information and for Other Purposes, S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

other hand, stated that the exemption should protect from disclosure the operating rules, guidelines, and manuals of procedure for government investigators or examiners. 5/ Moreover, a related provision of the Act, subsection (a)(2)(C) (which requires an agency to make available to the public "administrative" staff manuals and instructions to staff that affect a member of the public) implies a distinction for law enforcement manuals or guidelines for auditing and inspection procedures.

The bill would resolve this confusion by expressly protecting confidential information in manuals and instructions to investigators, inspectors, auditors, and negotiators from disclosure. This change complements the amendment to Exemption 7(E) relating to guidelines for law enforcement investigations or prosecutions. See generally, Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981). The inclusion of negotiators in this list reflects the government's legitimate need to maintain the confidentiality of its instructions to staff in contexts other than law enforcement, such as government procurement programs. The term "negotiators" should include not only law enforcement personnel who are called upon to negotiate the settlement of pending and impending litigation, but also agency staff who conduct negotiations for the procurement of goods and services, the acquisition of lands, the resolution of labor-management disputes, the release of hostages, or any other negotiations conducted in the course of carrying out a legitimate governmental function where the release of such instructions or manuals may jeopardize the success of the negotiations.

The addition of Exemption 2(B), relating to testing or examination materials used to determine individual qualifications for employment, promotion, and licensing, would protect from disclosure materials that would compromise the objectivity or fairness of the testing, examination, or licensing process within various agencies. A similar provision exists in the Privacy Act of 1974, 5 U.S.C. § 552a(k)(6).

Personal Privacy

Section 8 of the bill changes the FOIA's personal privacy exemption (Exemption 6) in three respects. The change in the threshold language to cover all "records or information concerning individuals" and to eliminate the existing "similar files" language is intended to reinforce the correctness of the Supreme Court's decision in United States Department of State

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5/ House Committee on Government Operations, Clarifying & Protecting the Right of the Public to Information, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

v. Washington Post Co., 456 U.S. 595 (1982), where the Court repudiated a formalistic reading of "similar files" by the U.S. Court of Appeals for the District of Columbia Circuit.

The bill also would reconcile the FOIA and the Privacy Act on the matter of disclosure of lists of names and addresses. The Privacy Act of 1974, 5 U.S.C. § 552a(n), currently provides that "[a]n individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law," and the accompanying Senate Committee Report stated that the disclosure of mailing lists by the government is "totally inconsistent with the purposes of the bill." 6/ Although one court has held that the disclosure of mailing lists is "wholly unrelated to the purposes behind the Freedom of Information Act and was never contemplated by Congress in enacting the Act," 7/ other courts have required such disclosure. 8/ This provision should provide somewhat greater protection against this abuse by making agencies' disclosure of such lists expressly subject to FOIA Exemption 6.

Section 8 also modifies the standard of proof by allowing agencies to withhold records when disclosure "could reasonably be expected to" result in a clearly unwarranted invasion of personal privacy. Despite the importance of the right to individual privacy, which Congress has sought to protect in the Privacy Act of 1974, 5 U.S.C. § 552a, and the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401, et seq., many credit bureaus, employment agencies, and other third parties routinely attempt to use the FOIA to acquire financial and personal information about individuals. The current law, which has been construed as "an imposing barrier to nondisclosure" that weighs "heavily in favor of disclosure," 9/ hinders the government's ability to protect individuals legitimate privacy

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6/ Senate Committee on Government Operations, Protecting Individual Privacy in Federal Gathering, Use and Disclosure of Information, S. Rep. No. 93-1183, 93d Cong., 2d Sess. 31 (1974).

7/ Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974).

8/ National Western Ins. Co. v. United States, 512 F. Supp. 454 (N.D. Tex. 1980); Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454 (D.D.C. 1977); Minnis v. United States Dep't of Agriculture, 3 Gov't Discl. Serv. (P-H) ¶ 83,232 (D. Or. 1983) (appeal pending).

9/ Kurzon v. Department of Health and Human Services, 649 F.2d 65, 67 (1st Cir. 1981). See also Washington Post Co. v. Department of Health & Human Services, 690 F.2d 252 (D.C. Cir. 1982).

interests. Although it retains the "clearly unwarranted" language, the language of Section 8 allows greater leeway to protect the rights of individuals against inquiring third parties by permitting agencies to withhold information whenever disclosure "could reasonably be expected" to cause an invasion of personal privacy.

Law Enforcement

Section 9 of the bill makes several significant improvements in the language of Exemption 7, which protect law enforcement files from mandatory disclosure. Exemption 7 authorizes the withholding of law enforcement investigatory records only to the extent the government can demonstrate that one or more of six specific categories of harm will be caused by the release. While this exemption is intended to protect the government's important law enforcement interests, it has proved to be inadequate in practice.

The Department of Justice has extensive experience with the problems caused by the application of FOIA to criminal law enforcement agencies. Of the more than 61,000 requests for access to records of the Department received in 1982, a significant portion were directed specifically to the Department's criminal investigatory agencies, the Federal Bureau of Investigation (which received over 19,000 such requests) and the Drug Enforcement Administration. Significantly, a large number of these requests -- over 80 percent at the DEA -- were from convicted felons or from individuals whom the FBI and DEA believe to be connected with criminal activities. Such requesters have made extensive use of FOIA to obtain investigatory records about themselves or to learn the scope of ongoing investigations, identify government informants, and uncover government law enforcement techniques. One suspected organized crime "hit man" has filed over 137 FOIA requests for this purpose, and others have boasted that they have used the FOIA for the purpose of identifying informants.

A mainstay of law enforcement today is the volunteered statements and background information provided to federal agencies by confidential sources, particularly for key criminal enterprises relating to narcotics, organized crime, and extremist violence. However, because of the large volume of FOIA requests from known or suspected criminals, many sources -- private citizens and "street" informants alike -- have become reluctant to assist the FBI or DEA because of fears that the government cannot protect their identities. Moreover, this perception exists not only among individual informants, but also state and local law enforcement agencies, who fear losing their own sources of information when the federal government discloses the information they have.

S. 774 would close gaps in the coverage of Exemption 7, helping to give better protection to law enforcement files and

to dispel perceptions that the government cannot protect the identities of its confidential sources. The current threshold language of Exemption 7 means that records are eligible for protection only if they are "investigatory records" compiled for law enforcement purposes. See FBI v. Abramson, 456 U.S. 615 (1982). The bill would eliminate this "investigatory" requirement and would apply Exemption 7 generally to all "records or information" compiled for law enforcement purposes. This language would expand the categories of documents eligible for protection under Exemption 7 to include certain types of background information, law enforcement manuals, procedures, and guidelines.

Pending investigations. Section 9 also amends the language of Exemption 7(A) to ensure better that ongoing law enforcement investigations will not be compromised by the FOIA. The standard of harm would be changed from the present test -- whether or not disclosure "would" interfere with a pending proceeding -- to exempt all records or information the disclosure of which "could reasonably be expected to" interfere with enforcement proceedings. Even so, this change in the standard of harm, as welcome as it is, would not protect law enforcement agencies against the burden of responding to FOIA requests by the targets of law enforcement investigations -- a practice that can significantly hinder the agency's conduct of ongoing investigations. 10/

Confidential sources. Similarly, Exemption 7(D) would be amended from its current language protecting against disclosure of information that "would" disclose the identity of a confidential source. Under S. 774, an agency could withhold information that "could reasonably be expected to disclose the identity of a confidential source" -- including information that may not itself identify an informant but that, when viewed in context with other information known to a requester, could enable a requester to piece together facts that reveal the identity of a informant.

Law enforcement guidelines. The bill would amend Exemption 7(E) to grant broader protection to records containing statements of law enforcement or prosecutorial guidelines. This would fill the gaps in the current language of Exemption 7(E), whose limitation to "investigative techniques and

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10/ See, e.g., Kanter v. IRS, 433 F. Supp. 812 (N.D. Ill. 1977), dismissed, 478 F. Supp. 552 (N.D. Ill. 1979) (IRS required to file 13,000-page affidavit to support withholding of investigatory records).

procedures" has proven insufficient to protect many sensitive law enforcement materials from disclosure. 11/

Personal safety. The current language in Exemption 7(F) exempts records only if their disclosure would endanger the life of a law enforcement officer. However, the exemption does not give similar protection to the life of any other person. S. 774 expands Exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process.

Informant files. Under current law, criminal organizations can use the Act to attempt to uncover suspected informants in their midsts simply by asking for the records of individuals whom they suspect of being informants. In such cases, it is not sufficient that the FBI could respond that it is withholding the informant's file under Exemption 7(D), because the very step of specifying that exemption identifies the person as a confidential source. The bill would add a new subsection (a)(9) to the FOIA that would solve this problem by excluding the informant files of law enforcement agencies from the scope of the Act whenever those records are requested according to the informant's name or personal identifier by a third party. Under this amendment, the agency could properly limit its response to any collateral records or, if no such other records exist, properly respond that it has no records responsive to the FOIA request.

Organized Crime

Law enforcement agencies have found that organized criminal elements have attempted to use the Freedom of Information Act to uncover government informants in their midsts or to discover information concerning government investigations. Organized crime has the incentive and the resources to use the Act systematically to gather, analyze, and piece together disparate, often apparently innocuous pieces of information obtained from government files into a "mosaic" that reveals the full scope of the government's investigations and, perhaps, the identities of the government's informants. Application of the Act to such files thus presents a significant risk of inadvertent disclosure of harmful information. Indeed, in some cases, acknowledgement of the very existence or non-existence of records relating to particular investigatory activities or designated individuals provides valuable information to criminal organizations.

11/ See, e.g., Jordan v. Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978) (U.S. Attorney manuals and guidelines).

Section 13 of the bill would rectify some of these problems. The Attorney General would be authorized to designate lawful investigations of organized crime conducted for criminal law enforcement purposes for protection under a new subsection (c) of the FOIA. Any document compiled in the course of those special investigations would not be subject to disclosure under the FOIA for five years after they were generated or acquired. (The subsection also provides for the Attorney General to promulgate regulations for an earlier disclosure, or a longer exclusion up to three more years, in cases of overriding public interest.) Notwithstanding any other provision of law, such documents must remain available for disclosure of non-exempt portions for ten years after the expiration of this exclusion.

Reasonably Segregable

Section 11 would clarify the current requirement that agencies disclose information that is reasonably segregable from exempt portions of documents. The bill authorizes agencies to take into account the potentially harmful effect of disclosing parts of sensitive law enforcement or national security records that can supply the "pieces" to complete a mosaic picture.

The purpose of the "reasonably segregable" requirement in the 1974 amendments to the Act was to require government agencies to release any meaningful portion of a requested record that could be separated from portions that were specifically exempt from disclosure. The courts have often strictly enforced this policy. While much useful and nonconfidential information has been released under this clause, both the courts and the agencies have expressed concern that some "reasonably segregable" information may actually prove threatening to national security and law enforcement interests when pieced together with other non-exempt or publicly available information.

Exemption for Secret Service Records

The bill would add a new Exemption (b)(10), intended to assist the Secret Service in maintaining the confidentiality of information required to carry out its important protective functions. The 1974 amendments to the FOIA have severely limited the amount of informant information available to the Secret Service, thereby jeopardizing its ability to safeguard the President and other important individuals.

Proper Requests

Section 12 of the bill would amend the provisions of subsection (a)(3) of the Act to address three important types of use or abuse of the Act not foreseen by Congress.

Under current law, an agency is required to comply with any request for records covered by the FOIA made by "any person." The bill would amend the Act to require the agency to make information available only to a requester who is a "United States person." Restricting the right to make requests to United States persons would reverse the present rule that "any person," including foreign nationals and governments, can use the FOIA to secure information. This proposed amendment is consistent with the purpose of the FOIA to inform the American public of government actions. It would also prevent the use of the FOIA by foreign nationals and governments for purposes which may be contrary to our national interest.

Section 12 would also amend the Act to limit the ability of a party to a pending judicial proceeding or administrative adjudication, or any requester acting for such a party, to use the Freedom of Information Act for any records which may be sought through discovery in the proceeding. Many government agencies report significant numbers of such requests, whose purpose is often to avoid applicable rules of discovery and sometimes -- where the government is a party -- to harass and burden government agencies. The bill would toll the FOIA time limits for response whenever a party files a request relating to the subject matter of a pending judicial or administrative adjudication in which the government is a party and may be requested to produce the records sought. This would allow the request for records to be supervised by the judicial or administrative tribunal in conjunction with the entire proceeding.

Finally, the bill would authorize the Attorney General, by regulation, to set conditions for the use of the FOIA or the Privacy Act by imprisoned felons, to the extent that these conditions are not in derogation of the purposes of the FOIA. This will authorize reasonable limitations on the use of the FOIA by prisoners to identify informers or to obtain other law enforcement information. At present, almost 60% of the FOIA requests to the DEA are from imprisoned drug offenders, and some prisoners have filed literally dozens, even hundreds, of FOIA requests.

Reporting Uniformity

Section 14 of the bill would amend the reporting requirements of subsection (d) of the FOIA to provide for the filing of reports on December 1 of each year covering the preceding fiscal, rather than calendar, year. Most agencies maintain their records on a fiscal year basis and must convert them to an annual year basis in order to comply with existing law. The amendment would remedy this problem by conforming the reporting requirement to data collection practices.

Definitions

Section 15, provides specific definitions for six critical terms and phrases to be utilized in the application of the amended Freedom of Information Act. These six phrases are: "agency," "submitter," "requester," "United States person," "working days," and "organized crime."

Publication of Exemption 3 Statutes

Section 16 provides for a new subsection (g) of the FOIA, requiring each agency to publish in the Federal Register, within 270 days of enactment of the subsection, a list of all statutes upon which the agency proposes to rely to withhold information under Exemption 3 of the FOIA, and a description of their scope. The Department of Justice shall thereupon publish a consolidated list of all such statutes. After the 270 day period, or 30 days after subsequently enacted statutes, no agency may rely upon a statute not listed as a basis for withholding information.

II. COMMENTS OF THE DEPARTMENT OF JUSTICE

The previous discussion indicates the many areas in which S. 774 would respond to identifiable shortcomings in the operation of the Freedom of Information Act. The bill has been the subject of a long and careful series of compromises in the Senate among the various interested participants. In this process of compromise, the bill has been made to focus on certain specific problem areas, while leaving other areas untouched. As in any compromise, the final product does not always suit perfectly the initial objectives of the various groups, and S. 774 indeed does not include some of the provisions that the Department of Justice initially sought in its proposed amendments to the FOIA. It is, however, a very significant step forward, in that it does respond to many of the shortcomings the Department has identified, and it does represent the first time that the Congress has taken a long and careful look at the changes necessary to avoid some of the unintended abuses and weaknesses of the FOIA resulting from overly broad disclosure in certain circumstances.

At the same time, however, the bill has been carefully crafted so as not to interfere with the primary purpose of the FOIA as enacted in 1966 and amended in 1974 -- to ensure that a free people have the necessary means to obtain from their government the information they need for an informed debate over the operations of that government. S. 774 would have only the most limited impact on the ability of the press or other groups to obtain information bearing on the public interest in their government. Indeed, the amended time limit provision is intended to promote prompter response to those requests that do

implicate the public interest. The bill would not interfere with individuals' existing right to obtain information on themselves under the Privacy Act of 1974. And the bill would have virtually no impact on the many news stories that have been written over the last decade based on disclosures obtained under the FOIA.

Because the bill is a responsible and carefully crafted effort to limit the shortcomings and abuses of the present provisions of the FOIA, while at the same time completely preserving the central purpose of that Act, the Department of Justice strongly recommends enactment. A strong case has already been made for this bill, by the Department of Justice and by many others interested in the operation of the FOIA. We urge this Committee to give full recognition to the voluminous testimony presented to the Senate Committee on the Judiciary, and to that Committee's careful evaluation of the various legislative proposals. We urge that action be taken on this bill during the present Congress.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this legislative report from the standpoint of the President's program, and that enactment of S. 774 would be in accord with the President's legislative program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General
Office of Legislative and
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